**IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON**

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| STATE OF WASHINGTON,<br><br>Respondent,<br><br>vs.<br><br>JEFFREY PHILLIP STEVENS,<br><br>Appellant. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | DIVISION ONE<br><br>No. 55502-2-I<br>(Consolidated with No. 55580-4-I)<br><br>**UNPUBLISHED OPINION**<br><br>FILED: July 31, 2006 |

**BAKER, J. —** Jeffrey Stevens was convicted of burglary, assault, robbery, and hit and run. He challenges the sufficiency of the evidence and effectiveness of his counsel on two issues: jury instructions, and a motion to sever that was not renewed before the close of evidence. We affirm because the evidence was sufficient, the jury instructions were proper, and the motion to sever was properly denied and would not have been granted if renewed.

**I.**

Stevens and Kimberly Ortiz dated for about seven months. When Stevens became possessive and controlling, Ortiz ended the relationship. Stevens continued to call and email Ortiz, sometimes leaving 100 messages at a time. Right after one angry email from Stevens, Ortiz's roommate and sister discovered her car had been keyed. Stevens sent more emails and left a rose

on Ortiz's car. The next day, a Friday, Ortiz emailed Stevens saying she wished no further contact. While she was away over that weekend, Stevens entered her house, using a key he had secretly made while they were dating, and burglarized it. Ortiz did not hear from Stevens for two weeks.

Early in the morning of June 17, 2004, Stevens used another secretly-made key to hide in the cargo area of Ortiz's vehicle. When Ortiz got into the car to go to work and realized Stevens was in the back, she began to scream. As she tried to escape from the car, Stevens tried to restrain Ortiz and injured her. A bystander, Blake Howell, heard the screaming and pulled Ortiz from the car. He then attempted to restrain Stevens, hitting Stevens several times in the process. Stevens pulled up a pant leg to reveal a diving knife secured around his ankle in a sheath. Howell immediately backed away with his hands in the air. Stevens used his copy of Ortiz's key to take her car. Howell motioned to the driver of another car to block Stevens' exit. Stevens hit the other car hard enough to rip off a large portion of the front bumper of Ortiz's SUV. He then drove away.

Stevens went to stay with his cousin, Patrick Ketcham, in California. He told Ketcham to call Stevens' sister, Diane Jackson, and ask her to retrieve a black bag from Stevens' residence. Ketcham did so, and when Jackson retrieved the bag, she discovered that it contained items taken from Ortiz. Jackson turned the bag over to the police, who verified that it contained almost all of the items taken in the Ortiz burglary. Stevens was arrested by U.S.

marshals in California and returned to Washington. He was charged with burglary, first degree robbery with a deadly weapon enhancement, fourth degree assault, and hit and run attended.

Defense counsel made a pretrial motion to sever the burglary count from the others. After consideration of the relevant factors, the court denied the motion. The motion to sever was never renewed by Stevens.

The State moved to exclude the defenses of duress and necessity. During the discussion, the court clarified that self-defense is not available when the defendant puts himself in the situation which caused the alleged self-defense. Defense counsel acknowledged this, and clarified that he would not be making that argument.

During deliberations, the jury asked for clarification from the court that one element of hit and run attended is damage to the other vehicle involved. The court said that it was. The jury convicted Stevens on all counts, and found that he had a deadly weapon.

**Insufficient Evidence**

When reviewing a challenge to the sufficiency of the evidence, we must determine, considering the evidence in the light most favorable to the prosecution, whether "'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'"[1] We draw all reasonable

[1] State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (emphasis omitted) (quoting Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)).

inferences from the evidence in the prosecution's favor, and interpret the evidence most strongly against the defendant.[2] We assume the truth of the prosecution's evidence and all inferences that the trier of fact could reasonably draw from it.[3] We defer to the trier of fact to resolve any conflicts in testimony, to weigh the persuasiveness of evidence, and to assess the credibility of the witnesses.[4] Circumstantial evidence is as probative as direct evidence.[5]

Stevens argues that there was insufficient evidence to support the deadly weapon enhancement. For purposes of a deadly weapon enhancement special verdict,[6] a knife with a blade longer than three inches is a deadly weapon as a matter of law.[7] That fact, if proven with sufficient evidence, supports the deadly weapon enhancement.[8]

The State presented sufficient evidence that the knife blade was longer than three inches. Blake Howell, the eyewitness who struggled with Stevens, described the knife in great detail. Although he could not see the blade inside the sheath, Howell testified that the knife's sheath was "palm's width, maybe longer." Stevens did not challenge evidence as to the length of the knife; he

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[2] State v. Joy, 121 Wn.2d 333, 339, 851 P.2d 654 (1993); State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

[3] State v. Wilson, 71 Wn. App. 880, 891, 863 P.2d 116 (1993), rev'd on other grounds, 125 Wn.2d 212, 883 P.2d 320 (1994).

[4] State v. Boot, 89 Wn. App. 780, 791, 950 P.2d 964 (1998).

[5] State v. Vermillion, 66 Wn. App. 332, 342, 832 P.2d 95 (1992).

[6] Stevens does not challenge the deadly weapon element.

[7] RCW 9.94A.602.

[8] Stevens' analysis under State v. Thompson, 88 Wn.2d 546, 564 P.2d 323 (1977) is irrelevant. There is no allegation or evidence in the record that Stevens ever wielded the knife.

simply denied that he had a knife at all. Stevens cites no support for, and makes no argument why no rational trier of fact could have found that the blade was longer than three inches, based on Howell's testimony. Drawing all reasonable inferences in favor of the State, a rational jury could have concluded that the knife blade was longer than three inches.

Stevens also argues that the State produced insufficient evidence to convict him of hit and run attended, because no evidence showed damage to the vehicle he hit. Damage to the struck vehicle is an element of hit and run attended.[9] Even purely circumstantial evidence, with no eyewitness, can be sufficient under the hit and run statute.[10]

The State produced sufficient evidence for a rational trier of fact to conclude that the other vehicle was damaged. Several eyewitnesses testified that a collision took place, severe enough to rip off part of Ortiz's front bumper. Stevens himself did not dispute this fact. Although the State did not offer direct evidence, it was reasonable for the jury to infer that the car Stevens hit was damaged.

**Ineffective Assistance of Counsel**

To prevail on his claim of ineffective assistance of counsel, Stevens must meet both prongs of a two-prong test.[11] He must first establish that his counsel's representation was deficient.[12] To show deficient performance, he has the

[9] RCW 46.52.020(2)(a).
[10] State v. Donckers, 200 Wash. 45, 49-50, 93 P.2d 355 (1939).
[11] State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).
[12] State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996).

"heavy burden of showing that his attorneys 'made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment.'"[13] Deficient performance is not shown by matters that go to trial strategy or tactics.[14] Second, Stevens must show that the deficient performance resulted in prejudice such that "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different."[15] We employ a strong presumption that counsel's representation was effective.[16]

Stevens argues that counsel should have requested a second degree robbery instruction, because the jury could reasonably have found that he did not display what appeared to be a deadly weapon. Second degree robbery is the unlawful taking of property from another in his presence or against his will by use or threat of force violence, or fear of injury.[17] First degree robbery is robbery committed with a deadly weapon, display of a firearm or deadly weapon, or which inflicts bodily injury.[18]

Stevens cites State v. Barker,[19] in which the court held that a second degree robbery instruction was appropriate when there was conflicting evidence regarding whether the defendant used a firearm.[20] But failure to offer a lesser

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[13] State v. Howland, 66 Wn. App. 586, 594, 832 P.2d 1339 (1992) (quoting Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

[14] Hendrickson, 129 Wn.2d at 77-78.

[15] Hendrickson, 129 Wn.2d at 78.

[16] McFarland, 127 Wn.2d at 335.

[17] RCW 9A.56.190, .210(1).

[18] RCW 9A.56.200(1)(a).

[19] 103 Wn. App. 893, 14 P.3d 863 (2000).

[20] Barker, 103 Wn. App. at 901-02.

offense instruction is not ineffective assistance if it can be characterized as part of a legitimate trial strategy to obtain an acquittal.[21] In State v. King,[22] a man convicted of second degree assault argued that his counsel should have requested a lesser degree assault instruction. However, the court observed that such an instruction would have most certainly resulted in conviction, and that counsel's decision to pursue an "all-or-nothing tactic" could have resulted in an acquittal.[23]

Stevens' situation is much like King's. Having been convicted of first degree robbery, he now complains that he should have been afforded the chance to be convicted of a lesser offense. If the second degree robbery instruction had been offered, Stevens almost surely would have been convicted, because he essentially admitted to every element of that offense in his testimony. Counsel's only chance for an acquittal was to offer only first degree robbery and contest the use of a knife; he made that argument to the jury. Since the actual knife was not recovered or entered into evidence, this was a legitimate strategy. Counsel was not ineffective on this basis.

State v. Ward[24] is distinguishable. In that case, two repossession agents were confronted by Ward as they tried to repossess his car. The agents claimed Ward pointed a gun at them.[25] The State charged Ward with two counts of

[21] State v. King, 24 Wn. App. 495, 498-99, 601 P.2d 982 (1979).
[22] 24 Wn. App. 495, 601 P.2d 982 (1979).
[23] King, 24 Wn. App. at 501.
[24] 125 Wn. App. 243, 104 P.3d 670 (2004).
[25] Ward, 125 Wn. App. at 246.

second degree assault.[26] At trial, Ward claimed that he believed the agents were car thieves and that he was trying to defend his property. He and his girlfriend also testified that Ward only displayed the gun by opening his coat.[27] Defense counsel did not offer an instruction for the lesser included offense of unlawful display of a weapon, and Ward argued that this was ineffective assistance. This court agreed, concluding that it was "objectively unreasonable" to use the all-or-nothing strategy in Ward's case because (1) the jeopardy for Ward was considerably greater; (2) the defenses would have been the same for both charges; and (3) the approach was risky because it relied on Ward's credibility regarding his claim of self-defense, which was seriously impeached.[28]

None of the three Ward factors is present here. First, in Ward there was a considerable difference between two convictions for second degree assault (two felonies, each with a deadly weapon enhancement) and one conviction for unlawful display (a gross misdemeanor with no deadly weapon enhancement).[29] Here, the difference is between first or second degree robbery. Second, Stevens' defense to first degree robbery was lack of a deadly weapon; that defense would not apply to second degree robbery. Stevens could not have argued self-defense, because he was the first aggressor. Finally, on the issue of self-defense, Ward was severely impeached. Ward told police when they first arrived that he knew the agents were coming to repossess the car, but at trial

[26] Ward, 125 Wn. App. at 247.
[27] Ward, 125 Wn. App. at 248.
[28] Ward, 125 Wn. App. at 249-50.
[29] Ward, 125 Wn. App. at 249.

stated that he thought the agents were thieves.[30] Nothing like that happened here. Stevens claimed to other witnesses and on the stand, that he never had a knife. Other than Howell's testimony, there was no evidence to contradict Stevens. Neither the knife nor the holster was ever found; the State only presented pictures of similar knives. While Stevens' credibility on other issues was shaky, there was not such a blatant contradiction in his own testimony as there was in Ward. Counsel used a legitimate trial strategy by choosing to instruct on first degree robbery only.

Stevens next contends that counsel should have requested a self-defense instruction to the robbery charge. If self-defense is not available based on the undisputed evidence, then failing to offer the instruction is not ineffective assistance.[31] Self-defense is not available when the defendant provoked the altercation and continues behaving aggressively when, for example, the altercation is an attempt to thwart a robbery.[32] Stevens had not abandoned his aggressive behavior when he decided to steal Ortiz's car; he did something which caused Howell to retreat with his hands up.[33] Counsel properly declined to request a self-defense instruction.

Because counsel's actions were legally and strategically sound, Stevens' counsel was effective.

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[30] Ward, 125 Wn. App. at 250.
[31] King, 24 Wn. App. at 501.
[32] State v. Craig, 82 Wn.2d 777, 783-84, 514 P.2d 151 (1973).
[33] Although Stevens disputed that he had a knife, he confirmed eyewitness testimony that Howell moved back just before Stevens stole the car.

**Motion to Sever**

Stevens also argues that the trial court erred in refusing to sever the burglary offense from the other charges. If severance is waived, he argues ineffective assistance of counsel for failure to renew the motion.

CRr 4.4(a) requires the defendant to make a pretrial motion to sever and, if overruled, to renew the motion before the close of evidence. If he fails to do either, severance is waived by the clear language of the statute.[34] Stevens concedes that he did not renew the motion. The issue is waived on appeal.

Stevens therefore argues that counsel was ineffective, and the issue must be reviewed under that standard. Stevens cannot succeed unless he demonstrates that counsel's performance was deficient and prejudiced the defense.[35]

"Defendants seeking severance have the burden of demonstrating that a trial involving both counts would be so manifestly prejudicial as to outweigh the concern for judicial economy."[36] Prejudice may result from joinder if the defendant is embarrassed in the presentation of separate defenses, or if use of

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[34] The full rule is: "**Timeliness of motion – Waiver.** (1) A defendant's motion for severance of offenses or defendants must be made before trial, except that a motion for severance may be made before or at the close of all the evidence if the interests of justice require. Severance is waived if the motion is not made at the appropriate time. (2) If a defendant's pretrial motion for severance was overruled he may renew the motion on the same ground before or at the close of all the evidence. Severance is waived by failure to renew the motion." CRr 4.4(a).

[35] Strickland v. Washington, 466 U.S. 668, 692, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

[36] State v. Bythrow, 114 Wn.2d 713, 718, 790 P.2d 154 (1990).

a single trial invites the jury to cumulate evidence to find guilt or infer a criminal disposition.[37] Any possible prejudice is mitigated where (1) the State's evidence is strong on each count; (2) the defenses to each count are clear; (3) the court instructs the jury to consider each count separately; and (4) the evidence of each count is admissible on the other count.[38]

As to the first prong of the test, the State's evidence was strong on all counts, even assuming that Stevens would not have testified if the burglary count had been severed. Stevens told his sister, Diane Jackson, that he had secretly copied keys to Ortiz's apartment. He told Jackson to pick up a black bag at his residence. When Jackson retrieved the bag, she suspected that it contained Ortiz's possessions. She called the police, who verified that the items were stolen in the Ortiz burglary. When Jackson spoke to Stevens later, he "acknowledged what was in the bag" and listed off some of the items recovered. As to the other three counts, Stevens admitted to them on the stand and there were several eyewitnesses.

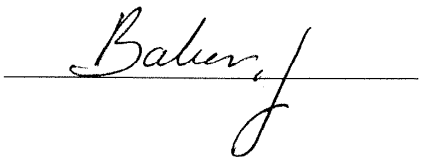
The other elements of the mitigation test favored denial of the motion to sever. The defenses were clear. Stevens had the same defense for the burglary as he had for two of the three other charged offenses, a general denial. On the robbery charge, Stevens' defense was lack of intent and no use of a deadly weapon. The court did instruct the jury to consider each count

[37] State v. Russell, 125 Wn.2d 24, 62-63, 882 P.2d 747 (1994); State v. Watkins, 53 Wn. App. 264, 268, 766 P.2d 484 (1989).

[38] Russell, 125 Wn.2d at 63.

separately. Finally, evidence of the burglary was admissible as to the other counts under ER 404(b),[39] because it informed the motive of the June 17 crimes.[40] Stevens admitted to harassing Ortiz in the weeks preceding the assault, robbery, and hit and run. The burglary was part of a harassment pattern, which explained his motivation to attack Ortiz and steal her car on June 17. Stevens also tried to exculpate himself by testifying that he waited for Ortiz in the back of her car because he "wanted to talk to her about getting her stuff [taken in the May 30th burglary] back to her." Given that the pretrial motion to sever should not have been granted, Stevens' argument fails the second prong of the Strickland test: showing that counsel's performance prejudiced the defense. It was not ineffective assistance for defense counsel to fail to renew the motion.[41]

AFFIRMED.



WE CONCUR:

[39] "**Other Crimes, Wrongs, or Acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b).

[40] State v. Giffing, 45 Wn. App. 369, 373-74, 725 P.2d 445 (1986) (evidence of victim's theft accusation admitted to show motive for murder of same victim).

[41] State v. Standifer, 48 Wn. App. 121, 125-26, 737 P.2d 1308 (1987).

Ajid, J.

Grosse, J.